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Customary international law and command responsibility in Ukraine as a successful way to punish war crimes

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Abstract: The Ukrainian Constitution and the Criminal Code of Ukraine do not precisely establish the principle of command responsibility. This paper aims to highlight command responsibility as a form of criminal liability based on past jurisprudence, i.e. from *ad hoc* tribunals to the International Criminal Court. In particular, Art. 28 of the Statute of the ICC as well as the Milanković v. Croatia case from the European Court of Human Rights have affirmed command responsibility as a fundamental principle of customary international law that is applied in the context of an armed conflict. The Milanković case has highlighted the punishment that comes from command responsibility in the absence of a specific national law at the time crimes are committed, thus overcoming the *ex post factum* legal recourse. Ukraine has passed laws to amend its Criminal Code and has provided for command responsibility as a general

form of criminal liability. Ukraine has used command responsibility to hold Russian commanders accountable for war crimes, that are committed after the passage of the bill and the constitutional prohibition on *ex post facto* laws. They rely on international precedents, such as the Milanković case and others from *ad hoc* criminal tribunals and from the ICC for crimes committed by their subordinates before the passage of a new law on the matter. Command responsibility has been *tempore criminis* essential to customary international law for the duration of the war in Ukraine holding Russian commanders accountable for war crimes and their subordinates in the absence of a law in force. This principle lends a helping hand to the work of Ukrainian prosecutors as an additional mode of criminal responsibility in helping and obtaining justice against high-ranking Russian military commanders for private combatants such as mercenaries and for war crimes, which are committed under their subordinates through the ongoing war in Ukraine.

Keywords: command responsibility; IICIU; ICTY; ICTR; STSL; ICC; ICJ; ECtHR; ECHR; war crimes; constitution of Ukraine; Milanković v. Croatia; international criminal law; customary international law; *tempore criminis*; war crimes; commands to subordinates.

Introduction

War crimes and crimes of humanity (Liakopoulos, 2019a) include genocide as part of customary international law.[1] As for command responsibility, a principle of customary international law, is a reality that includes the duty of military commanders to prevent their subordinates from committing such crimes.[2]

Subordinates commit war crimes, as well as other unlawful acts including aggression. As is obvious, the commander is responsible for punishing the guilty who commit such conduct.[3] If the commander, as we have seen in the past, does not punish his subordinates, it is he who becomes responsible for the crime that was committed by them. In our case, we are interested in military command responsibility in Ukraine.

The principle of responsibility in the criminal justice system is a modus of general criminal responsibility that also includes war crimes (Alonso, 2010).[4] The essential elements for command

1Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003): https://caselaw.findlaw.com/court/us-2nd-circuit/1036814.html (Accessed on 22.09.2025) "(…) customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern (…)".

2Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002): https://law.justia.com/cases/federal/appellate-courts/F3/289/1283/483592/ Accessed on 22.09.2025.

3Ukraine Constitution, art. 58: "(…) shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence (…)". Criminal Code of Ukraine Art. 5(2): "(…) law on criminal liability that criminalizes an act or increases criminal liability or otherwise deteriorates the situation of a person shall not be retroactive in time (…)".

4ECtHR, Milanković v. Croatia of 20 January 2022, App. No. 33351/20, par. 60: "(…) beyond doubt that the responsibility of commanders for war crimes committed

responsibility are: a) the existence of the relationship of subordination-superiority between the commander and the perpetrator of the crime; - the commander knew the cause of the circumstances at the time his subordinates committed it and that they planned to commit acts that violate the law of war; - the commander failed to prevent the commission of crimes and did not punish his subordinates after the commission of this type of crime. If this is the case, we are talking about a violation of Art. 58 of the Ukrainian Constitution as well as of Art. 5, par. 2 of the Criminal Code of Ukraine which prohibit *ex post facto* laws.[5]

In Milanković v. Croatia case,[6] command liability is used as an instrument of indirect liability that finds application in the international armed conflict in Ukraine. First of all, it was the state of Ukraine itself that had to prove that the law amending section II of the Criminal Code allows for the initiation of criminal proceedings based on command liability and the related modalities of criminal liability.

Such a solution facilitates the prosecution of crimes for the foreseeable future. It is the Ukrainian prosecutors who will have to show sufficient authority to overcome the related prohibition

in the course of an international armed conflict was *tempore criminis* an existing rule of international law (…)".

5Criminal Code of Ukraine, par. II Ukraine's laws on criminal liability and modes of criminal responsibility-or lack thereof, presently.

6ECtHR, Milanković v. Croatia, op. cit.

that has been imposed by the country on *ex post facto* laws.

Overall, command responsibility is considered as an essential *modus* for international criminal responsibility (Bloch, 2023). The relevant convictions that come from command responsibility have actual knowledge for their wrongdoing and are practiced by international laws.

The same international norms also help Ukraine to seek its own justice for war crimes that are committed within the borders of its country. Ukraine also relied on the Milanković case in the European Court of Human Rights (ECtHR) thus amending the Criminal Code that codifies command responsibility as a criminal responsibility of an additional instrument to prosecute Russian commanders and oligarchs.[7]

Such an amendment goes beyond the process that is approved by the Verkovna Rada in the past[8] providing an internal justification for criminal proceedings based on command responsibility that put commanders in front of their own responsibility to be prosecuted for certain actions. This type of rule is also based on customary international law, which grants Ukrainian prosecutors the power to circumvent their country's ban on *ex post facto* laws and to prosecute Russian oligarchs for war crimes committed during the conflict.

7Milanković v. Croatia, op. cit., par. 63: "(…) accessibility does not exclude reliance being placed on a law which is based on custom (…)".

8Verhkovna Rada of Ukraine as an unicameral Parliament of Ukraine.

War in Ukraine. Events from 2014 to 2025

The act of aggression in Ukraine from the Russian Federation is not new. Since 2014, continuous political unrest was a reality since the then Ukrainian president Viktor Yanukovich rejected the economic integration of the country with the EU. The continuous unrest resulted in people taking to the streets against Yanukovich's decisions until reaching the famous Maidan revolution (CBC news, 2022).[9]

In Kiev, in Maidan square some police officers died after violent clashes with security forces supported by Russia (Mèheut, 2023). After the clashes, the then president Yanukovich and his dismissal from the Verkovna Rada resulted in the entry of Russian troops into Crimea as well as the annexation of the southern Ukrainian region (Walker, 2023).[10]

The armed conflict alarmed the whole world and especially its adversaries (Atlantic Council, 2023). The conflict lasted eight years, until 24 February 2022. At that time, Russian forces invaded Ukraine for a second time and Vladimir Putin started the war in the name of a special military operation (Tharoor, 2024).[11]

9CBC news affirmed that: "(...) name "Kiev" is now associated with the "Russification of Ukraine", and how many sources have switched to using the spelling "Kyiv" to recognize that Ukraine "does have the right to exist as an independent nation, contrary to what Vladimir Putin has been stating" (…)".

10Walker: "(…) a detailed account of the eight years of conflict in eastern Ukraine between Ukrainian government forces and Russia-backed separatists (…)".

11Tharoor affirms that: "(…) intelligence officials dispute Zelensky's estimate for Ukraine's casualties—some 31,000 soldiers killed in the fighting—and believe the

The continuous violence in Ukraine showed the damage at all levels and especially the environmental one.[12] Russian forces fought with continuous bombings and damaged hospitals, destroyed cities, such as Mariupol, increasing as a consequence civilian deaths. As far as Western intelligence was concerned, a number of Ukrainian military victims exceeded 62,000.

The continuous violations of international law against Russian forces invading Ukraine have raised concerns and discussion in the United Nations Human Rights Council. It established an Independent International Commission of Inquiry in Ukraine (IICIU) with the aim of:

"(...) investigating human rights violations and abuses, violations of international humanitarian law and other crimes that may have been committed in the context of the aggression of the Russian Federation against Ukraine (...)" (OHCHR, 2022).

In fact, the IICIU's investigations have established that war crimes are indeed being committed in Ukraine (Lukov, 2022; Amnesty International, 2022).

War crimes in Ukraine committed by Russian forces

As of 23 September 2022 the IICIU reported that Russian forces committed war crimes in Ukraine against civilian and military

figure is far higher, likely more than double (…)".

12 Press Release: UN Commission Concludes That War Crimes Have Been Committed in Ukraine, Expresses Concern About Suffering of Civilians, U.N. Human Rights Office of the High Commissioner (23 September 2022).

personnel. Crimes that also included damage to buildings and infrastructure in populated areas, such as hospitals and schools after the use of explosive weapons.[13]

The president of the IICIU, Erik Møse, stated that his commission interviewed witnesses and investigated alleged executions of civilians, as well as ill-treatment, torture, sexual violence, atrocities committed by Russian forces (Akita, 2024)[14].

During the first months of fighting in Ukraine, testimonies to the commission exceeded 20,000 for war crimes. Crimes of aggression have been committed by Russians since the beginning of the invasion thus simplifying the attack on a drama theater in Marriupol that housed about a hundred civilians (Ellyatt, 2025).[15]

13Office of the General Prosecutor of Ukraine, Crimes Committed During the Full-Scale Russian invasion: "(…) running estimation of alleged war crimes); see also 122,000 Suspected War Crimes (…)".

14Akita affirms that: "(…) Ukrainian authorities assume that Russians could deport or forcibly remove approximately up to 200,000 children (…)". See also the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukrainian v. Russia Federation: 32 States intervening, Public Sitting: introduction, 2023 I.C.J. 14, par. 15 (19 Sept.): "(…) a slightly different number ofchildren (19,474 children) allegedly illegally transferred from Ukraine to Russia). Ukraine has Already Verified Almost 19.5 Thousand Children in Russia, Ukranian Crisis Media Center (7 November 2023): https://uacrisis.org/en/ukrayinoyu-vzhe-veryfikovano-majzhe-19-5-tysyach-ditej-na-terytoriyi-rosiyi Accessed on 22.09.2025 "(…) Ukraine has already verified 19,498 children in Russia (…)".

15Ellyatt affirms: "(…) how Russia refused to participate in peace talks with Ukraine at the World Economic Forum in Davos, Switzerland (...)". Roy affirms that: "(…) Ukraine's rejection of a Russian cease-fire proposal that would have required Ukraine to hand over certain territory to Russia and drop its NATO membership goals (…)".

The General Prosecutor's Office in Ukraine estimated that more than 200,000 children have been removed from Ukrainian territory (Sauer, 2023).[16]

The numbers are increasing without an official source and the war continues until Russia rejected Ukraine's demands to end an occupation of more than ten years (Van Den Berg, Deutch, 2023).

After the related report of 23 September 2022, the IICIU also documented countless attacks by Russian armed forces for more than two years and concluded a final report that was published on 19 October 2023. According to which the

"(…) Russian authorities committed war crimes such as intentional killings, torture, rape and other sexual violence, as well as deportation of minors to the Russian Federation (…)" (Mikheiev, 2024).[17]

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16 See in particular the Independent International Commission of Inquiry on Ukraine, Report of the Independent International Commission of Inquiry on Ukraine, U.N. Doc. A/78/540, at 2 (19 Oct. 2023)

17 Press Release: Situation in Ukraine: ICC Judges issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, Internationl Criminal Court (17 March 2023): https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (Accessed on 22.09.2025): "(…) both President Putin and Commissioner Lvova-Belova are allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (...)". Press Release: Situation in Ukraine: ICC Judges issue Arrest Warrants Against Sergei Kuzhugetovich and Valery Vasilyevich Gerasimov, ICC (25 June 2024): https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and (Accessed on 22.09.2025): "(…) arrest warrants for Sergei Kuzhugetovich Shoigu, Minister of Defen[s]e, and for Valery Vasilyevich Gerasimov, Chief of the General Staff of the Armed Forces of the Russian Federation, for war crimes allegedly committed while in their official positions (…)". Mikheiev affirms that: "(…) Mr. Shoigu and Mr. Gerasimov face charges related to the bombing of Ukraine's civilian energy infrastructure during the first winter of Russia's invasion, and detailing other

The Kiev Prosecutor General, in a list of alleged crimes committed in Ukraine after the Russian invasion, refers to murders and executions, bombings of civilian infrastructure, forced deportations, kidnappings of minors, torture, sexual violence, illegal detentions.[18] Obviously, the numbers increase as the war continues and the conclusion remains the same, namely that the war crimes committed will continue to be committed by Russian forces against the people of Ukraine.

Administration of justice in the days of war in Ukraine

A first arrest warrant against President Putin and Maria Lvova-Belova was issued on 17 March 2023. It is a warrant from the International Criminal Court (ICC) for war crimes and the deportation and illegal transportation of children to areas of Ukraine from the Russian Federation (Bravin, 2023).[19]

High-ranking Russian officials are indicted for alleged war crimes and crimes against humanity that were committed during

indictments for Russian Air Force Chief Sergei Kobylash and Russian Fleet commander Viktor Sokolov over the bombing of Ukraine's power grid (…)".

18 ICTY, Prosecutor v. Milošević, Case No. iT-02-54, indictment (ICTY, 22 May 1999) ("(…) former sitting President of Serbia, Slobodan Milošević, for various general and specific charges (…) over certain actions taken by his subordinates in violation of Article 7(3) of the ICTY statute (…)".

19 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukranian v. Russia Federation: 32 states intervening), Public Sitting: introduction, 2023 ICJ, 13, parr. 23–24: "(…) President Putin's publicly broadcast speech which "expressly refer[s]" to Article 51 of the United Nations Charter as its legal basis for Russia's special military operation in Ukraine (…)".

the first months of the invasion in Ukraine.[20] The related arrest warrants showed the commitment of the international community as a method to punish Russian perpetrators of war crimes. The arrest warrants of the ICC could be linked to an international arrest.[21]

The Russian Federation argued that the legality of its actions and especially the special military operation in Ukraine is recognized by Russia and the two states of Eastern Ukraine, puppet states recognized since 2014 as territories that are not parties to the Geneva Convention but to the Charter of the United Nations, part of customary international law. Russia continued to argue that the conflict in Ukraine falls within the jurisdiction of the International Court of Justice (ICJ) (Klobucista, Ferragamo, 2024).

The preliminary objections by Russia regarding its jurisdiction were partially rejecting by the ICJ (Tropin, 2023). ICJ stated that the jurisdiction examined after request of Ukraine is:

"(…) credible evidence (...) Ukraine was committing genocide in violation of the Convention on Genocide in Eastern Ukraine, which Russia used as a

20 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukranian v. Russia Federation: 32 states intervening), Public Sitting: Second Preliminary Objection, 2023 I.C.J. 13, par. 3: "(…) legality of these actions [are] not under the Genocide Convention, but under the UN Charter and customary international law (…)".

21 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n: 32 states intervening), Judgment: Preliminary Objection, par. 151, (2 February 2024): "(…) the ICJ does have limited jurisdiction to entertain certain issues raised by Ukraine in its Memorial (…)".

pretext to invade Ukraine in 2022 (…)" (Emtseva, 2023).

The final decision of ICJ is binding, but nevertheless the war continues to this day for more than four years. The ICJ and the ICC together with other international courts as well as the ECtHR have no police powers and will have to rely on the cooperation of national governments for the execution of orders.[22] It is unlikely that Russian commanders will voluntarily submit to the jurisdiction of these international courts who are responsible for these crimes (Sykes, 2013).[23]

The ECtHR as an international super partes court has already taken a stand for cases brought by Ukraine against Russia and which can be tried since 2023. The ECtHR stated that the Russian invasion of February 2022 was "a continuation of the war that began eight years earlier, in 2014". This position meant that the ECtHR has authority to examine human rights violations that are committed by Russia, at the time Russia ceased its participation in the European Convention on Human Rights (ECHR).

Ukraine needed an active, monitoring tool for Russian actors who were responsible for war crimes. The majority of them

22Criminal Procedure Code of Ukraine, art. 323(3): "(…) hearing in criminal proceedings as to the crimes specified in part 2 of Article [1] of this Code may be held in absentia, without the accused (…)".

23Sykes affirms that: "(...) controversial nature of trials *in absentia* in the international arena, as well as the ethical and moral questions unique to trials conducted without the defendant present (…)". Criminal Procedure Code of Ukraine, art. 323(3) in relation of various safeguards and procedures relating to trials *in absentia* in Ukraine.

were verified after Russia's withdrawal from the jurisdiction of the ECHR.

There were many options available at a national and international level for Ukraine, such as the ICC which had to do justice and fight against Russian forces. The Ukrainian criminal procedure rules already provided for trials *in absentia* (Mettreaux, 2005; Bloch, 2023).[24]

The fight to convict Russian commanders through Russian trials in absentia did not, therefore, prevent the perpetrators from further violations of the law (Mettraux, 2009).[25] Additionally, there was no need for the international community to engage in these crimes since Ukrainian courts had the responsibility to prosecute Russian crimes that were committed on Ukrainian soil.[26] And the question to think about is how will Ukrainian

24Rome Statute of the international Criminal Court, Preamble, 17 July 1998, 2187 U.N.T.S., par. 90: "(…) it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions (…)". Mettraux confirms that: "(…) principle of command responsibility provides that under certain circumstances a commander (or superior) may be held criminally responsible if he or she fails to prevent or punish the criminal acts of his or her subordinates of which he or she knew or had reason to know (…)". and Bloch affirms that: "(…) doctrine of command responsibility seeks some other association between the commander and the offense (…) equal or graver in severity with respect to the main perpetrator (…)".

25ICTY, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment, par. 239, ICTY, 20 February 2001): "(…) "superior responsibility" is not equivalent to a "vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability (…)".

26See also Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002): "(…) the United States Congress intended to adopt the doc- trine of command responsibility based on its international law construction by pass- ing the Torture Victim Protection Act (TVPA) (…)".

prosecutors proceed to prosecute these types of crimes during and after the war?

Command responsibility through the international criminal justice theory

Commanders who are criminally responsible for crimes committed by their subordinates are part of a framework that deals with international criminal justice.[27] As it is stated in this regard:

"(…) the superior may be held criminally responsible not for his role in the commission of crimes by his subordinates, but because of his personal and culpable omission to take necessary and reasonable measures to prevent or punish such crimes (…)".[28]

The command responsibility is a responsibility for acts, omissions of the commander in preventing, punishing crimes of his subordinates.[29]

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27 ICTR, Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, par. 50 (ICTR, 3 July 2002): "(…) long as a superior has effective control over subordinates (…) punish them after they com- mitted the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control (…)". Ford, 289 F.3d at 1290–91: "(…) international cases consistently have found that effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine (…)". ICTY, Delalić et al., Case No. IT-96-21-A, Judgment, par. 197: "(…) questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles (…)".

28 See Art. 28(2) of statute of ICC.

29 Ukranian Constitution and Criminal Code of Ukraine, par. II, art. 3. Criminal Code of Ukraine, par. II, art. 6(1) ("(…) person who has committed an offence in the territory of Ukraine shall be criminally liable under this Code (...)"), and Criminal Code of Ukraine, par. II, art. 6(3) "(…) offence shall be deemed committed in the territory of Ukraine if the principal to such offence, or at least one of the accomplices, has acted in the territory of Ukraine (…)".

According to Art. 28 of the Statute of the ICC the main body of law that codifies the standard elements for criminal responsibility for commanders and other superiors within the jurisdiction of ICC is a reality and is connected with the exercise of criminal prosecution. We must say that command responsibility includes: -the relationship of superiority-subordination between the perpetrator of the crime and his commander; -the superior should have knowledge for a crime committed, in the course of commission and that has been committed; -the superior failed to prevent his subordinate from committing his crime that he failed to punish subordinates in an appropriate manner for crimes committed.[30]

The *ad hoc* criminal courts argued that the prosecutor should prove that the accused military commanders are based on the theory of command responsibility and have effective control over the troops in order to be held responsible. According to Art. 28, par. 2 of the Statute of ICC the responsibility is applied:

"(...) for superior and subordinate relationships not described (…)" (Miller, 2023).[31]

30Cummings v. Missouri, 71 U.S. 277, 287–88 (1866): "(…) American prohibition against convicting someone under an *ex post facto* law (…)". Ukranian Constitution: art. 58: "(…) shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence (…)". Criminal Code of Ukraine, art. 4: "(…) new laws on criminal liability shall enter into force 10 days after its official promulgation, unless otherwise provided by the law itself (…)".

31Miller affirmed that: "(…) Ukrainian government has collected evidence of around 109,000 alleged Russian war crimes, including physical and cyberattacks, according to Ukrainian Prosecutor General Andriy Kostin" and indicted 300 suspected perpetrators (…)".

Why did Ukraine not prosecute the command officers?

The Constitution of Ukraine does not contain the principle of command responsibility as a form of criminal liability. The same holds with the Criminal Code and with other laws in this regard (Mettraux, 2009).[32] Similarly, Art. 58 of the U.S. Constitution states that

"(…) no person shall be liable for acts which, at the time they were committed, were not criminalized by law (…)" (Lepard, 2017).

It held a commander liable according to the theory of command responsibility which is not available at the moment constituting thus a violation based on *ex post facto* laws.[33]

The Ukrainian government could pass a law on command responsibility, as a new form of liability, which could be applied in the future to any war crime committed after its adoption. Ukraine has been fighting this non-stop war until now and dozens of deaths for alleged crimes reported by the Ukrainian government.

The adoption of a new law could help that Ukraine needs to prosecute a number of Russian war crimes that are committed.

32Mettraux affirms that: "(…) supporting preference for prosecutions of high-ranking officials, and suggesting that high-profile prosecutions might "neutralize [a commander's] political influence (…) combat the general culture o impunity that has long characterized the international society" than prosecution of foot-soldiers and low-ranking officials would (…)".

33Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d. Cir. 2003).

More than that Ukraine needs to get to the head of these commands who gave orders to commit such crimes thus imposing criminal liability on the commander who ordered war crimes to young soldiers who followed orders and committed such atrocities.

The principle of customary international law

Over the years, customary international law has been described as a

"(...) law which has been accepted by custom in accordance with reason among the majority of nations or which has been agreed upon by individual nations (…)".[34]

Customary law includes a broad framework of international law, which also contains liability for violations of international law, the law of international armed conflict, the protection of human rights, international criminal law, etc. (Liakopoulos, 2020b).[35] Over time, a complex has been created:

"(...) from the general customs and practices of nations and therefore does not derive from a single, definitive and easily identifiable source (…)".[36]

34ICJ, Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, par. 27 (3 June): "(…) material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states, even though multilateral conventions (…) role to play in recording and defining rules deriving from custom, practice" and "acceptance as law" (…)".

35ILC, Report on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 125–26 (2018).

36ICJ, North Sea Continental Shelf (Germany v. Denmark, Germany v. Netherlands), Judgement, 1969, I.C.J. 4, par. 77: "(…) need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates* (…) concerned must therefore feel that they are conforming to what

Customary international law is composed of rules and laws:

"(...) clear and unambiguous to which states universally abide, or to which they adhere, out of a sense of legal obligation and mutual interest (…)".[37]

Art. 38, par. 1, lett. b) of the statute of the ICJ affirmed and highlighted the international convention and treaty between nations, custom, the dominant legal source for obligations, rights of these nations (Liakopoulos, 2020; Bloch, 2023).[38]

Customary law is a law that is part of international law. It comes from many sources, such as international conventions, international customs that in practice are accepted as law, i.e. general principles of law that are recognized by civilized nations, etc.[39]. Thus, a norm of customary international law is established according to Art. 38 of the statute of the ICJ containing important elements within it. Elements such as: -a general practice for custom on the part of states; -the acceptance

amounts to a legal obligation (…)".

37ILC Draft Conclusions, op. cit., parr. 132-133: "(…) states can exercise "executive, legislative, judicial, or other functions" to demonstrate state practice, and listing various examples of state practice that would be considered sufficient to establish that element of customary international law (…)".

38ICJ, North Sea Continental Shelf, Judgment, 1969, I.C.J. par. 77: "(…) must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (…)". PCIJ, S.S. "Lotus" (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10 23, at 28: "(…) rarity of the judicial decisions to be found (…) were sufficient to prove the circumstance alleged (…) would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom (…)".

39ILC Draft Conclusions, op. cit., par. 138: "(…) the *opinio juris* element as the "subjective" or "psychological" element" (…)".

of law on the part of states.[40]

The general practice without the acceptance of law by states, a corpus of customary international law is not established.[41]

The states will have to comply with what amounts to a legal and moral obligation[42]. The practice creates the conduct with physical and verbal way of a norm of customary international law (Minakov and others, 2022). A state accepting the practice as law render binding the international law. The latter is independent of national actions and concerns (Cwalina, 2023).

The International Law Commission (ILC) includes as a second element for the formation of a norm in customary international law the subjective standard that distinguishes use and habit, as observation of actions to a country (Peleschuk, Starkov, 2023).

The ICJ highlights that states demonstrate the evidence of *opinio juris* through various and multifaceted public opinions, publications and general behavior on principles of international importance.

40According to the Commission, is noticed: "(…) Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of states; official publications; government legal positions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or an intergovernmental conference (…)".

41ILC Draft Conclusions, op. cit., parr. 135-136: "(…) practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent (…)".

42ICJ, North Sea Continental Shelf, Judgment, 1969 I.C.J. parr. 74, 77.

Customary law in the Ukraine case

The principle of customary international law is not acceptable by Ukraine as long as it is binding.[43]

Ukraine has had a singular behavior in the evaluation of a principle which has been sufficiently implemented by customary international law. On the other hand, the Russian Federation did not believe that customary international law is regulated by its actions through the war in Ukraine. This principle is extensive and uniform with a well-established practice.

Ukraine has made many efforts to follow the European legislations in recent years and has also shown that it wants to be part of the EU.[44]

In June 2022, the EU granted Ukraine the status of the candidate country. Ukraine has made great strides in suppressing the injustice and corruption of the previous government as well as in aligning itself with the European legislation.

Ukrainian President Volodymyr Zelenskyy has not stopped since the first moment of the Russian aggression to inform all European leaders about and to support Israel by condemning the terrorist attack at the end of 2023. This shows that Ukraine is making steps forward to have a recognition of its ongoing conflict according to the rules of international law (Klose,

43Ukranian Constitution, art. 58: "(…) shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence (…)".

44ECtHR, Milanković v. Croatia, op. cit.

2022).[45]

The continuous reforms from Ukraine to join the EU and the support to Israel have shown its interest in adopting similar principles and gaining support also from other countries neighboring or not, as an idea of preserving a political approach that respects the laws and holds accountable the violations within its borders.

The current Ukrainian landscape and the role of command responsibility as part of customary international law as well as the logic to follow were based on the determination that command responsibility is a principle recognized by customary international law at the time when war crimes are committed in Ukraine. Furthermore, this determination gives Ukraine the power to prosecute crimes committed by senior military commanders under the name of war crimes and under command responsibility which thus violates the prohibition of *ex post facto* laws (Human Rights Watch, 2022).

45Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of international Armed Conflicts (Protocol I), art. 85(3), 8 June 1977, 1125 U.N.T.S. 17512. In particular: Article 85 affirms that: "(…) willfully committed and causing death or serious injury to body or health, the following acts are regarded as grave breaches of the Geneva Conventions: (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (…) (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (…) (d) making non-defended localities and demilitarized zones the object of attack (…)".

Statutes of international courts and Geneva conventions

Speaking by customary law we mean Art. 85 of the Additional Protocol to the Geneva Conventions ("Protocol I") which highlights the grave breaches of the conventions. Protocol I deals with grave breaches of the conventions and with war crimes. Art. 86 of Protocol I established that the parties to the conflict shall take the necessary measures to repress the breaches of the Geneva Conventions that arise from the fulfillment of the duty to do so (Buleiko, 2023).[46]

Art. 86 highlighted the criminal liability for omission of the autonomous method of the commission of war crimes.[47] We speak of indirect liability to superiors according to the condition that they must know who of their subordinates violated the conventions by committing war crimes. Instead art. 87 refers to military commanders imposing on them to prevent, repress, punish the breaches of the conventions.[48] It is recalled, in this

46Buleiko affirms that: "(…) myths arose around the Rome Statute and the ICC in the highest political circles of Ukraine, all because of a misunderstanding of how the ICC and the Rome Statute work (…)".

47Press Release: Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014, ICC, (8 September 2015). Art. 12(3) of statute of ICC: "(…) accept the exercise of jurisdiction by the court with respect to the crime in question. The accepting state shall cooperate with the court without any delay or exception (…)".

48U.N. Secretary-General, Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808, art. 7(3), U.N. Doc. S/25704 (3 May 1993): "(…) eventual establishment of the Statute of the international Tribunal

regard, that Ukraine and Russia were parties to the Geneva Conventions of 1949 and of Protocol I.[49]

The ICC has defined command responsibility as a key of customary international law, according to the Statute of the ICC (Tammsaar, 2023).[50] In this way, indirect criminal liability is codified for superiors and for all crimes committed by armed forces organized according to their effective control at a time when the superior failed to exercise adequate control, thus failing to immediately prevent criminal acts punished *a posteriori*.

The functioning of the ICC and the fear that this institution is prosecuting Ukrainian military personnel despite the fact that Ukraine was not a member from the beginning and has not ratified the Rome Statute is an important consequence for the evolution of international criminal law.[51]

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for the Prosecution of Persons Responsible for Serious Violations of international Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (25 May 1993)).

49Statute of the international Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of international Humanitarian Law Committed in Rwanda, U.N. SCOR, 49th Sess., 3453d, art. 6(3), U.N. Doc. S/RES/955 (11 Aug. 1994): "(…) criminal responsibility for superiors in Rwanda); Agreement on the Establishment of a Special Court for Sierra Leone, art. 6(3), U.N.-Sierra Leone, Jan. 16, 2022, 2178 U.N.T.S. 137, U.N. Doc. S/RES/1315 (14 Aug. 2000): "(…) criminal responsibility for superiors in Sierra Leone (…)". ECtHR, Milanković v. Croatia, op. cit., par. 34: "(…) similarities in statutory language of the various statutes creating the aforementioned international criminal tribunals (…)".

50Tammsaar affirms that: "(…) the creation of an international criminal tribunal for the War in Ukraine (…)".

51ICTY, Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-A, Judgment, ICTY, 22 Apr. 2008.

Ukraine has exercised and accepted the jurisdiction of the ICC over crimes under the ICC Statute that are committed on its territory, based on Art. 12, par. 3 of the statute (Henckaerts, Doswald-Beck, 2005).

The ICC has had the power to investigate war crimes and other crimes that are committed on its territory of Ukraine even if it has not ratified the Rome Statute. Ukraine was obliged in practice to ratify the ICC Statute before it gained accession to the EU.[52]

Ukraine thus believes that the nations that will ratify it will consider its claims for international justice on its territory. Ukraine's relinquishment of jurisdiction and efforts to join the EU have the consequence of furthering its efforts to engage with the ICC and to have its principles of international criminal law recognized through the ICC Statute.

Both ad hoc tribunals and the ICC are established to contribute to developing command responsibility as a criminal liability in international criminal law. Art. 7, par. 3 of the statute for the International Criminal Tribunal for the former Yugoslavia (ICTY) is similar to the articles of the Geneva Protocol I. It states that acts committed by subordinates do not exempt

52Rule 153 affirms that: "(...) Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know (…) to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed to punish the persons responsible (…)".

superiors from criminal liability (Bloch, 2023).[53]

Art. 6, par. 3 of the International Crriminal Tribunal for Rwanda (ICTR) and Art. 6, par. 3 of the Atatute of the Special Tribunal for Sierra Leone (STSL) have highlighted individual criminal liability as regulated and established by other tribunals (Luna and others, 2023).[54]

Ukraine was a party to the Geneva Conventions and as a consequence also of Protocol I therefore it accepted the jurisdiction of the ICC as part of the Rome Statute.

Ukraine foresaw and accepted the principles of international law. Ukraine was consistent with the general efforts for reform, for the attempt to apply as a member of the EU and to hold Russian actors accountable for their war crimes. It is recalled that Ukraine did not have a legal authority to prosecute under a general and foreseen criminal responsibility for command at the national level since the Criminal Code was devoid of indirect responsibility for subordinate actions. Thus an international criminal court was established to prosecute war crimes that are committed through war in Ukraine mirroring the courts that have directly incorporated command responsibility.[55]

53Bloch affirms that: "(…) standing customary doctrine of command responsibility must rest on actual knowledge, not constructive knowledge (…)".

54Luna affirms that: "(…) The Wagner Group is a private mili- tary organization run by an ally of Russian leader Vladimir Putin with tens of thousands of fighters (…)".

55ICTY, Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-A, Judgment, ICTY, 22 April 2008. Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, par. 197, ICTY, 20 February 2001). Prosecutor v. Pavle Strugar, Case No.

The nexus between international case law and customary international humanitarian law

The situation in Ukraine was not unique worldwide and case law has shown similar cases in the past in the area of command responsibility.[56] Case law from ad hoc tribunals as well as from the ICC has contributed to building a corpus at an international level that regulates the role of command responsibility under customary international law.[57] It was the study from the International Committee of the Red Cross (Red Cross) that interpreted command responsibility.[58]

The study stated in Rule 152 that commanders and other superiors are criminally responsible for war crimes that are committed under their orders, as a rule of customary international law that is applicable to international and non-international armed conflicts.[59]

Rule 153 established that commanders and other superiors are vicariously criminally responsible for war crimes that are committed by their subordinates based on Art. 258 of the ICC.

IT-01-42-T, Judgment, ICTY, 31 January 2005.

56ICTY, Hadžihasanović, Case No. IT-01-47-A, op. cit., Judgment; Delalić et al., Case No. IT-96-21-A, Judgment, op. cit.

57ICTY, Hadžihasanović, Case No. IT-01-47-A, Judgment, op. cit.

58ICTY, Hadžihasanović, Case No. IT-01-47-A, Judgment, op. cit., parr. 4-5: "(…) was convicted for his command responsibility in failing to prevent murders and cruel treatment committed by his subordinates, and how Kubura was convicted for failing to prevent his subordinates from plundering villages (…)".

59ICTY, Delalić, Case No. IT-96-21-A, Judgment, op. cit., par. 197.

Rule 153 established a rule of customary international law applicable in international and non-international armed conflicts. Command responsibility as established by Rule 153 is interpreted by case law. It means that civilians are also held liable for war crimes based on command responsibility.[60]

The relationship between commander and subordinate is not necessary, as well as actual knowledge of the wrongful act committed by a subordinate was not required. But constructive knowledge of an wrongful act is sufficient to condemn such an act.[61]

The applications about traditional command responsibility to civilian superiors have effective control over direct actors for crimes. They are proved useful for Ukraine considering the relative commitment to private military organizations such as the Wagner Group.

Military organizations and private individuals such as the Wagner Group alongside Russian forces are responsible for war crimes. From the jurisprudential front, there are many decisions issued by various international courts in this regard (Mettraux,

60ICTY, Hadžihasanović, Case No. IT-01-47-A, Judgment, op. cit., par. 20. Delalić et al., Case No. IT-96-21-A, Judgment, op. cit., par. 197: "(…) questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles (…)". Hadžihasanović, Case No. IT-01-47-A, Judgment, op. cit., par. 31 (citing Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, par. 169 (ICTY, Sept. 17, 2003): "(…) the Accused superior knowing about prior acts of beating was relevant and sufficient to put the superior on notice that acts of torture may be occurring within his ranks, warranting further investigation (…)".

61ICTY, Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, op. cit., par. 417, ICTY, 29 July 2004.

2009).[62] An important role is noted in the Milanković case.[63] Also, the prosecutor in the Hadžihasanović and others case convicted two people who failed to prevent, punish certain crimes committed by their respective subordinates according to Art. 7, par. 3 of the ICTY Statute.

In the appeal judgment from ICTY, the convictions were confirmed and it was also reiterated that several practical principles of law will be fundamental for Ukrainian prosecutors.[64]

The Hadžihasanović case confirmed what we saw in the Ćelebići case by establishing that superiors have demonstrated that effective control over their subordinates in all cases regardless of whether the superiors committed the act *de jure* or *de facto*.

62ICTY, Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, op. cit., par. 41: "(…) the Trial Chamber's assessment of causation was unnecessary, but the error ultimately did not have an impact on their decision because it led to further analysis by the court (…)". Mettreaux affirms also that: "(...) dissociation between the superior's failure to act and the crimes committed by his subordinates would render command responsibility dangerously close to an objective form of strict liability (…) could be held responsible for any crimes committed by his subordinates (…)".

63ECtHR, Milanković v. Croatia, op. cit., parr. 37–38, which is citing also the case: Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ICTY, 12 November 2002: "(…) doctrine of command responsibility [was] already in-and [has been] since- 1991 (…) applicable in the context of an internal armed conflict under customary international law (…)". Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-AR72 Decision on interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY, 16 July 2003.

64ECtHR, Milanković v. Croatia, op. cit., par. 60: "(…) is beyond doubt that the responsibility of commanders for war crimes committed in the course of an international armed conflict was tempore criminis an existing rule of international law (…)".

The public prosecutor thus has the burden and the proof to show that the commander is not limited to the superior but must exercise a recognizable level of effective control over his subordinates.[65]

Art. 7, par. 3 as we have seen in the Hadžihasanović case stated that the courts shall ascertain that a superior is in possession of all the relevant and alarming information regarding the crimes that have been committed by his subordinates. As a consequence of this, the courts of first instance failed to punish a superior for the crimes committed by his subordinates.[66]

As regards the duty/power to punish a superior in the Hadžihasanović case it was established by measures taken to punish superiors for each crime committed by subordinates, according to art. 7, par. 3. Evidence determines first of all the sufficiency of measures that correct and highlight the adoption against the superior.

Command responsibility does not require and does not establish the relevant causal link for the commander's failure to prevent the crimes of subordinates as well as the verification of these

65ECtHR, Milanković v. Croatia, op. cit., par. 8-9: "(…) the original accusations: He was accused of having, in the period between 18 August 1991 and 20 June 1992, personally ill-treated civilians, ordered attacks against them, ordered their illegal arrests and detentions, the ill-treatment and killings of civilians and the ill-treatment and killing of a prisoner of war perpetrated by the police units under his command (…)".

66See also: Osnovni Krivični Zakon Republike Hrvatske (Basic Criminal Code of Croatia) (from 1 July 1977, to 31 Dec. 1997), which is affirmed that: "(...) no direct mention of the principle of "command responsibility" at the time when Mr. Milanković's subordinates committed the crimes in 1991 and 1992 (…)".

crimes. The assessment of the causal link provides and contributes to the decision of a court for a superior who has not taken reasonable measures to prevent the crimes of a subordinate.

The Hadžihasanović and Ćelebići cases increased and supported "the safeguard" for command responsibility as well as the principle that consolidates customary international law applicable to armed conflicts.[67] The main difference between these two has to do with the fact that Ukraine does not have an equivalent for Art. 7, para. 3 of the Statute of the ICTY.[68] Therefore, the ECtHR provides an international justification for

67 See, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, 4 Nov. 1950 213 U.N.T.S. 221, E.T.S. No.5. and accoriding to Article 7 of the European Convention on Human Rights affirmd that: "(…) shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed (…) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations (…)".

68 ICTY, Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, par. 275, ICTY, 1 September 2004, which is affirmed that: "(…) Appeals Chamber has held that (...) principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. This applies both in the context of international as well as internal armed conflicts (…)". Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, par. 357, ICTY, 31 January 2005: "(…) individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law, applicable to both international and internal armed conflicts (…)". Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, parr. 355–59, ICTY, 16 November 1998: "(...) no express limitation is made restricting the scope of this type of responsibility to military commanders or situations arising under a military command (…) Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the statute encompasses political leaders and other civilian superiors in positions of authority (…)".

Ukraine regarding the command responsibility for crimes committed and for those to be committed in the future.[69]

The contribution of the Milanković v. Croatia case to command responsibility

The Milanković v. Croatia case upheld a conviction for command responsibility on 20 January 2022. Croatian prosecutors invoked command responsibility by holding that Vladimir Milanković, a former deputy chief of the Sisak-Moslavina County Police Department, was responsible for failing to prevent numerous crimes committed against Croatian civilians by his subordinates. It was in June 2011 that the first investigation was initiated into killings and other criminal offences that were committed against individuals in Croatia between 1991 and 1992.

The resulting investigation and investigation led Croatian prosecutors to indict Milanković on 22 counts of war crimes against the civilian population. It was the same person who claimed to have committed eighteen crimes criminally responsible due to the failure to prevent and punish by the police units.

69ICTY, Prosecutor v. Hadžihasanović and others, Case No. IT- 01-47-AR72, Decision on interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, par. 31, ICTY, 16 July 2003.

The Croatian Criminal Code did not include any provisions for command responsibility as a form of liability. To overcome this obstacle, the Prosecutor's Office argued that Milanković's actions were criminal according to:

"(…) universally recognized norms of customary international law of war and humanitarian law [of customary international law] (…) namely that Mr Milanković was vicariously responsible as a commander (…)".[70]

The Croatian Court of First Instance convicted Milanković of eighteen war crimes based on command responsibility. The Supreme Court and the Croatian Constitutional Court upheld the same convictions. Milanković appealed to the ECtHR based on violation of Art. 7 ECHR (Villiger, 2023).

Command responsibility in non-international armed conflicts are sufficient for a norm of customary international law when police units perpetrated these types of crimes.[71] In the same case we saw the examination and reference of Hadžihasanović and Ćelebići cases,[72] as cases of command responsibility which were part of customary international law and as application of war crimes which are committed in the course of an internal armed conflict. The court confirmed the command responsibility which exists in non-international armed conflicts.

70Art. 7ECHR. Ukranian Constitution: Art. 58: "(…) shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence (…)".

71ECtHR, Milanković, op. cit., par. 60.

72ECtHR, Milanković, op. cit., par. 63: "(…) accessibility does not exclude reliance being placed on a law which is based on custom (…)".

The concept of responsibility created by Art. 7, par. 3 of the Statute of ICTY is also extended to non-military commanders including political leaders and other civilian superiors in positions of authority. Command responsibility in the course of an international armed conflict concerns *in tempore criminis* according to the applicable norms of international law.[73]

The ECtHR agreed with the positions of the ICTR that in internal armed conflicts the rules relating to simple military commanders but also to non-military superiors are applied. The ECtHR found that it knew such a conduct by Milanković as criminal despite the fact that there was no specific law defining criminalization and command responsibility in a manner sufficient and precise for international custom.[74]

Customary international law highlighted as foreseeable the inability of Milanković to prevent war crimes committed by the police under the command that made him criminally responsible. Similarly, the legality problem for Ukrainian prosecutors who faced command responsibility in Verkovna Rada is noted.

73ICTY, Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-A, Judgment, ICTY, 22 April 2008: "(…) adoption of command responsibility as a part of customary international law (…)". Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ICTY, 16 November 1998: "(…) foundation for adoption of command responsibility as a part of customary international law (…)".

74ECtHR, Milanković, op. cit., par. 57: "(…) the ICTY held that the application of the concept of command responsibility to war crimes committed in an internal armed conflict was already in 1991 a rule of customary international law (…)".

The Criminal Code of Croatia as well as the current one after 2014 prosecuted Russian war crimes based on command responsibility for crimes committed after 2014. The legality problem of retroactive nature was also encountered in Croatia. Ukraine relied on customary international law and in the Milanković case to fill the gap and also counter the *ex post facto* challenge that was presented by the defense considering command responsibility as an essential aspect of customary international law at least after 1991.

Art. 7 ECHR and Art. 58 of the Ukrainian Constitution walk in a parallel way. The ECHR as well as the Ukrainian Constitution protect fundamental interest and prohibit retroactivity for punishments. In the Milanković case it was argued that command responsibility existed as a principle of customary international law at a time when the crimes committed in Croatia did not have a valid *ex post facto* challenge.

Ukraine circumvented the issue of retroactivity for the same reason. The Milanković case affirmed command responsibility but did not raise the issue of retroactivity, according to Art. 7 ECHR, for cases after 1991 (Villiger, 2023).

Command responsibility was based on tempore criminis for the entire duration of the war in Ukraine as well as for war crimes that were committed from 2014 until today, which are prosecutable according to command responsibility.

Ukraine can rely on past cases and initiate criminal proceedings under command responsibility.

The ban on *ex post facto* laws in the Ukrainian case initiates criminal proceedings for Russian military commanders and Russian civilian superiors that are applicable under the theory of command responsibility. It essentially considers customary international law that has been tempore crimins, a valid mode of accountability at every stage of the war in Ukraine especially after 2014 until today that the war continues.

The Verkovna Rada immediately works to pass a law amending section II of the Criminal Code of Ukraine by adding command responsibility as a mode of accountability for crimes.

Ukrainian prosecutors and legal authorities investigate and indict responsible superiors both civilian and military due to their command responsibility for war crimes that are committed by soldiers within their effective control. This mode of accountability helps Ukraine to obtain justice for war crimes that are committed by directly prosecuting military commanders who are responsible for war crimes.

Command responsibility as part of international criminal law

Ukraine should pass laws amending the existing Criminal Code, i.e. providing additional rules for command responsibility and

war crimes. Passing laws is necessary for the Ukrainian criminal system which is based on a civil code. Ukrainian prosecutors and judges do not have the authority to prosecute and adjudicate crimes related to command responsibility.[75]

Such an action establishes command responsibility as a mode of liability for crimes committed after the adoption of a bill. Ukraine relies on the judgment of ECtHR to investigate and prosecute those whose orders occurred at a time prior to the adoption of the bill.

In this regard Artt. 85-87 of the Geneva Convention, Art. 28 of the Statute of ICC (Liakopoulos, 2019a), the study of the Red Cross as well as the statutes of *ad hoc* tribunals helped Ukraine to lay down a broad basis of international law and also derive the codification of command responsibility as a form of criminal liability.

Croatian prosecutors have managed to overcome the *ex post facto* prohibition for their country in the matter of command responsibility. However, they do not overcome the deficiency of the relevant laws since in the Milanković case it was established that command responsibility has been a norm of customary

75ICTY, Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgment, ICTY, 31 January 2005. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, par. 169, ICTY, 17 September 2003. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, par. 417, ICTY 29 July 2004. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, par. 275, ICTY, 1 September 2004.

international law since 1991.[76]

Command responsibility is a form of criminal liability that is accepted at an international level throughout the war period up to the present day and especially during the years of conflict, 2014 to 2022.

Prosecuting war crimes according to the Ukrainian provision and command responsibility does not constitute a retroactive application of the law. Command responsibility is responsible to prosecute war crimes. The statement of President Putin regarding part of the Russian brigade that was accused of committing war crimes in the city of Bucha, is noted in this regard (Siddiqui, 2023).

The 64th Separate Guards Motor Rifle Brigade killed civilians even after its withdrawal from Bucha. President Putin signed a letter congratulating the brigade for their work stating that "their great heroism and courage protects the sovereignty of Russia". The statements that President Putin made regarding the massacre could be evidence that he did not punish the Russian troops for war crimes.

This example also falls into the same reasoning that was discussed above for the arrest warrants of the ICC that President

76 ICTY, Prosecutor v. Hadžihasanović and others, Case No. IT-01-47-AR72, Decision on interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, parr. 17-31, ICTY, 16 July 2003: "(…) *de jure* power over subordinates creates a presumption of effective control, the "had reason to know" standard, the scope of a superior's duty to punish, and the causal link between a commander's failure to act and his subordinates' crimes (…)".

Putin and other senior officials can find a solution despite the existence of *absentia* trials.

One can also imagine the scenario of a lower-ranking Russian military commander captured, prosecuted and sentenced in a similar manner (Bergengruen, 2022). We cannot wait for Russian commanders to be brought to justice as well as for Ukrainian prosecutors to search for them independently. Each battle for justice strengthens the responsibility of command on Ukrainian territory, thus bringing closer the responsibility with the legal basis for condemning such atrocities.

Trying to amend the Criminal Code and provide for command responsibility means that Ukrainian prosecutors will have to further investigate the growing corpus of previous cases on the subject ensuring understanding of legal requirements and complexities existing in the matter, from a theoretical point of view.

Command responsibility exists and is considered by customary international law. Ukraine has not limited itself to choosing technical aspects but has also continued to adopt numerous guarantees and legal requirements that are connected.

The decisions we have seen such as Milanković, Hadžihasanović and Ćelebići are the harbingers that recognize the role of customary international law regarding international armed conflicts at internal and external levels. These cases are

far from relevant opinions in their own subject matter.[77]

Ukrainian prosecutors examine previous international cases. Courts have divided practical elements for command responsibility.

The element of knowledge of command responsibility, according to Art. 28, par. 1 of the ICC Statute (Liakopoulos, 2019b), clearly stated that military commanders knew and should have known that subordinates were committing and would commit war crimes and are criminally responsible for their crimes. This formula is reasoned to actual and constructive knowledge which sufficiently convicts a commander under command responsibility.

Current precedents thus suggest that convicting a commander of a war crime under this profile means that he has actual knowledge for the underlying crimes with mere constructive knowledge.

The distinction of requirements highlights the understanding that Ukrainian prosecutors develop and pursue command responsibility as the chosen mode of responsibility. Secondary sources we must say help prosecutors in this phase of prosecution and punishment.

77Commission of inquiry Finds Further Evidence of War Crimes in Ukraine, U.N. News (20 Oct. 2023): "(...) "Advanced Unedited Version" of the IICIU's Oct. 2023 (…) evidence of war crimes committed in Ukraine (…)".

Finding application of Ukrainian facts in previous cases of international law

Each individual who bears command responsibility behaves differently and not in a collective manner. This means that cases vary. Ukrainian prosecutors and law enforcement agencies will have to deal with and collect evidence necessary to prove the charges against war criminals only for commanders and superiors. This is an advantage for Ukrainian prosecutors.

On the other hand, private military personnel commit other war crimes. The channels of photo and video collection show such war crimes in progress as an unchanged and uncommented documentation. Already the General Assembly of the UN affirmed the mass of evidence and testimonies that were collected for the *ad hoc* commission during the investigation (Schlein, 2023).[78] It was already the commission that from 2022 reported that three Russian soldiers had gone to the home of a married couple. They beat the 52-year-old man and raped the 50-year-old woman. The couple reported the related rape to the commander of the Russian armed forces.

After the complaint the Russians entered the house without waiting for him and killed the couple. The soldiers who committed war crimes, such as voluntary homicide and torture

78See the report of October 2023 IICIU, op. cit., par. 34. Schlein affirms that: "(…) photographs of a forest mass grave site during an exhumation in the town of Izium, in Ukraine's Kharkiv region, and of the interior of a children's hospital hit by a Russian military strike (…)".

for the victim, are documented by the commission that made a list according to category of the related crimes.

The commander and the couple who reported the crime failed to react with other authorities to punish and prevent soldiers from committing harm to innocent civilians. The commission reported the *modus* that concerned the involvement of the Russian commander in the rape not only as responsible for the actions of his subordinates.

Ukraine theoretically can prosecute the related crimes on the condition that it should demonstrate in practice the elements that are required by the command responsibility.

The Russian commander responsible for the actions done and committed should also demonstrate: -the relationship between superior-subordinate; -knowledge for the crime/s committed; -the lack of an adequate response from the commander of the Russian forces and the related complaint of the victims and the commander himself for the three soldiers claiming that the reporting of the crime by the couple provided the commander with his knowledge of a war crime that was committed against the civilian population by Russian soldiers.

Ukraine should prove that the commander was aware of the rape as well as of any other crimes and torture (Liakopoulos, 2018) committed as well as providing evidence that the commander failed to prevent his subordinates from committing crimes and

punished them in an inadequate way for crimes already committed.

The lack of evidence to the contrary and the fact that the soldiers chased away the couple who reported their rape and not only the fact of a punishable crime leads to questionable reasoning for the commander, such as: -who ordered such punishable conduct?; -why did he not punish his soldiers adequately? -and why did he not prevent his soldiers from committing crimes by arresting them also for their own crimes that were reported? Ukrainian prosecutors will have to prove and consider as a goal to show that the Russian commander indirectly held responsible for the rape, torture and voluntary murder of the Ukrainian couple based on command responsibility.

The case of rape and murder of the couple from Ukraine was not the only for the many cases of war crimes that the Prosecutor's Office in Ukraine confirms every day since February of 2022 and after.

According to Art. 29 of the Statute of ICC all crimes, that are within the jurisdiction of the ICC not subject to the statute of limitations and that have to do with criminal liability for command according to Art. 28, are applied indefinitely by Russian commanders.

After the Milanković case, Ukraine has been thinking about prosecuting military commanders and commanders of past wars.

Ukraine has also been prosecuting alleged war criminals. This highlights the broad battle of Ukraine that disposes and puts itself at the forefront for command responsibility as well as for the fight against humanity, which is hoped for after the end of the war with the Russians.

Conclusion

Command responsibility was a topic that occupied all international courts. In this regard, the ECtHR highlighted and internationally approved that superiors, both military and civilian, who took part in an international armed conflict or do not bear command responsibility. A responsibility that is consolidated as a key principle for customary international law. International armed conflicts as well as internal ones that exceed the prohibition of their own country to apply *ex post factum* laws are applied to it.

In particular, the Ukrainian Verkovna Rada seems to have approved a law to formally codify command responsibility, as an alternative to general criminal liability. This opens the way for Ukrainian prosecutors to investigate and prosecute Russian commanders for war crimes that are perpetrated by their subordinates and by order of the commander by omission and punishment (Liakopoulos, 2024). Ukraine thus begins to prosecute war criminals based on the general theory of

command responsibility for crimes committed after the relevant bill was passed. This approach oriented with precise and clear way from the Milanković case of ECtHR. It also entrusted to prosecute all war crimes that are committed even before the approval of the bill.

Milanković is a new harbinger who has overcome the Ukrainian ban on the application of ex post factum laws by prosecuting Russian military and civilian commanders based on command responsibility for crimes committed under effective control. A control that turns out to be a powerful weapon for the Ukrainian prosecutors, who are trying to hold accountable the Russian leaders and the oligarchs who are guilty for the continuous atrocities that started from 2014 until today that the war is in progress in Ukraine.

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